Supreme Court of the United States

October Term, 1951

No. 661

C. B. King, John H. Gerken and M. F. Pafford,
Petitioners,

v.

J. Bradley Streit and A. W. Wallace, *Respondents.*

PETITIONERS' REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI.

PRELIMINARY STATEMENT.

Respondents open their brief by asserting that this is a simple suit for the specific performance of a contract, which contains no intricate propositions of law or complicated questions of fact. The taking of jurisdiction by the Supreme Court is dependent not upon intricate propositions of law or complicated questions of fact, but upon questions of the violation of simple human rights guaranteed by the Constitution—rights like that to be represented by counsel in capital criminal trials, or to refuse to salute the American flag in schools, etc. The rights here violated are perhaps less colorful, but equally fundamental.

While we have shown that the Florida Supreme Court incorrectly applied the law of contracts (R. 248), we do not predicate jurisdiction upon questions of fact nor upon rulings of the state courts as to contractual rights. The record shows that the consideration for the release was explicitly recited therein (R. 166). It consisted on the respondents' side of the return of $10,000 plus the cancellation of the first agreement, and on the petitioners' side of the cancellation. The consideration for the second agreement on the petitioners' side consisted of a promise to deliver stock conditional upon payment and promise to discuss voting trust, and on the respondents' side consisted of execution of the release.*

If the second contract were the sole agreement, there might be some justification for the ruling, but respondents had received consideration for execution of the release and for the promise contained in the second contract, namely that of the act of petitioners in returning the $10,000 deposit. The ignored release, therefore, was effective, even though the second contract failed. The same courts cannot permit extrinsic evidence as to consideration for the release other than what is expressed therein, and then firmly reject extrinsic evidence as to voting control in the first agreement, even though it was offered in support of a fraud defense. However, the application to the United States Supreme Court is predicated not upon wrong construction or error of law but upon the basic reasons stated in the original brief in the form of the seven questions presented.

Regardless of the right or wrong ruling by the state courts there was a failure to observe the procedural requirements of due process of law, and there was a violation of the rights guaranteed by the fourteenth amendment to

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* The English language is called upon to serve a queer purpose when a formal unconditional release of unquestioned validity is referred to as a "receipt" and it is said that the purpose and effect of the release has been destroyed by judicial "construction", i. e., a process in which the release was ignored.

the United States Constitution. That is the real basis of the petition for certiorari here presented, despite the attempt in the opposing brief to confuse by mis-statements and distortions of the facts and of the questions below.**

(1) Is There Merit to Contention That Petition for Certiorari Not Timely Filed?

On the coming down of the mandate on the first appeal the litigation was in no sense terminated. Questions that had previously been raised had not been disposed of. New federal questions could, and did, arise, by reason of the final decree which the Circuit Judge formulated and entered.

It was for the Circuit Judge to determine the kind and character of the final decree to be entered. He could have entered a decree that the parties "bargain" further as to the voting trust agreement. Respondents might have "elected" to so bargain to purchase 300,000 shares of the stock, and might have been unable to raise funds for the purchase of 440,000 shares thereof.

The conditions that might have been imposed in the decree could have caused the respondents as optionees, to be willing to drop the litigation. Their investment at the time was nil.

If a final decree had been entered as to the second option by reason of an election of the optionees, it is likely that no federal question would have arisen or would have been presented herein.

If following the first appeal by respondents to the Florida Supreme Court petitioners had applied here for certiorari they properly would have been told in the language of

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** Respondents have asserted that the Florida Supreme Court heard argument from counsel for both sides on the appeal from the decree of November 15, 1951 (R. 252-253). The statement is based on pure imagination. The Supreme Court of Florida at no time heard the appeal of petitioners. The errors committed against petitioners, as defendants, were never heard or reviewed. The appeal was dismissed immediately upon being docketed, as we have heretofore shown.

Grays Harbor Logging Co. v. *Coats-Fordney Co.*, 243 U.S. 251, 37 S. Ct. 295, 61 L. Ed. 702, that:

> "When the litigation in the state courts is brought to a conclusion, the case may be brought here upon the federal questions already raised as well as any that may be raised hereafter; for although the state courts, in the proceedings still to be taken, presumably will feel themselves bound by the decision heretofore made by the supreme court (82 Wash. 503), as laying down the law of the case, this court will not be thus bound. United States v. Denver & R. G. R. Co. 191 U.S. 84, 93, 48 L. ed. 106, 109, 24 Sup. Ct. Rep. 33; Messenger v. Anderson, 225 U.S. 436, 444, 56 L. ed. 1152, 1156, 32 Sup. Ct. Rep. 739; Coe v. Armour Fertilizer Works, 237 U.S. 413, 418, 59 L. ed. 1027, 1029, 35 Sup. Ct. Rep. 625."

A state court judgment is lacking in finality even where it compels *certain* action to be taken but offers various alternative ways to comply, some of which might involve further administrative and judicial proceedings. *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 68 S. Ct. 972, 92 L. Ed. 1212.

Unless the precise alternative has been selected and given effect, the Court cannot be certain how the litigant will be affected by the judgment, even though the federal issues might have been *substantially* identical whatever alternative is chosen. Id.

The fact that the highest state court in the second appeal refuses to consider or reconsider the federal issues presented or sought to be presented in the first appeal does not deprive the Supreme Court of jurisdiction to review the second judgment. Otherwise the normal and orderly process of review will be frustrated and the litigant will lose all chance for Supreme Court scrutiny of his federal rights. *Great Western Teleg. Co.* v. *Burnham*, 162 U.S. 339, 16 Sup. Ct. 850, 40 L. Ed. 991; *Louisiana Nav. Co.* v. *Oyster Commission*, 226 U.S. 99, 33 Sup. Ct. 78, 57 L. Ed.

138; *Urie* v. *Thompson*, 337 U.S. 163, 172-3, 69 Sup. Ct. 1018, 93 L. Ed. 1282.

It is submitted that the federal questions which had their origin in the Florida Supreme Court order of November 6, 1951 (R. 222) and those arising under later orders (R. 252, 273, 278, 307, and 328), while this litigation was being brought to a conclusion in the state court, were brought here at the earliest time possible under Title 28, Section 1257 (3), U.S.C. Review on a piecemeal basis by certiorari is neither permitted nor desirable. Respondents' contentions to the contrary appear to be without merit.

(2) Did Petitioners Voluntarily Comply With the Decree by Producing 431,442 Shares of the Stock?

There was no voluntary compliance. There is a contention to the contrary here made by respondents, of course, but the voluminous record belies this.

Petitioners raised the question and informed the Circuit Judge of the "short sale" feature of the case through the motion to dismiss the complaint, which was denied. It was wrongfully ruled out of the case then. Afterward, at hearing on our petition for procedural order (R. 239), which was denied, it was ruled out again. Previously, at the pretrial conference and at trial it had been ruled out. Respondents had been relieved of proving ownership. Streit knew when the first option was made and he and Wallace knew at the time of the second option that a "short sale" was being made.

After the first appeal, when petitioners repeatedly undertook to raise the ownership question they were summarily shut-off by the Circuit Judge saying "All that I want to know is whether you are going to produce the stock or not". There was apparent at all times outright approval to use the legal machinery of the Court for illegal purposes, namely, coercion of other stockholders.

The final decree of November 15, 1951 (R. 252), was entered with knowledge of the fact that specific per-

formance of a "short sale" was being enforced and that petitioners did not own the stock. That decree was entered with a threat of commitment for contempt for non-compliance as has been shown in our petition and first brief. See in addition the Miami Herald news article (R. 305), particularly the fourth paragraph thereof (second par. on p. 306).

(3) As to the Contention of Agency-Sheer Imagination as a Substitute for Due Process of Law.

Being confronted with the "short sale" character of the stock transaction, respondents here, for the first time, rely upon a purported agency between petitioners and the other owners of stock. In so doing, they resort to sheer imagination, basing their assertions upon the existence of family relationships, between some of the parties, having nothing more substantial upon which to dwell.*

As we have undertaken to point out in this case in various ways, a "short sale" of stock is obviously not subject to specific performance, as respondents certainly have known. Therefore, if respondents had believed that there is merit to their contentions as to agency, why were the "third-party" owners not named as defendants, in order that the issue of agency might be determined by due process of law? Why have respondents avoided and successfully circumvented that issue at every stage of the proceedings below? How is it to be held that petitioners and the absent (third-party) owners are to be bound with respect to questions which have not been litigated; as to which they

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* This contention points up the inaccuracy of respondents' blanket assertions that all of petitioners' defenses were considered. As a glaring example we mention the defense of fraud on the part of the optionee in the procurement of the first, and afterward released option. Due to a flagrantly obvious misconception as to the nature of that defense, it was ruled out entirely by the Circuit Judge and the Florida Supreme Court afterward denied petitioners' review on appeal. They were in fact denied the right to review at all stages of the proceedings, as has been shown.

have not had their day in court; and as to which the state courts have denied them even an opportunity to be heard? We respectfully refer to the discussion of our questions III-B, IV and V, in petitioners' main brief.

The unlitigated and until now disregarded "agency" issue has been relegated to a position similar to that of the release. When the release was executed it was the purpose and intent of the parties, as the document shows, to terminate, rescind and discharge their prior mutual obligations then in dispute, *and to get off to a fresh start.* Petitioners (members of the "Maule family") knew of the block of 200,000 shares of the stock obtainable from an outsider, and were willing to assume, under the stated conditions, the duty of delivering, *for the voting trust,* the number of shares called for. But no agency was involved, and we respectfully submit that a solution to the "due process problems" presented here is not to be found, correctly and justly, in such a device. There is here no more of "agency" than there is in other short sales of securities.

(4) Does Not the Question Arise: Whether the Bases of Fact Upon Which the State Courts Rested Their Decisions Denying the Asserted Federal Rights Have Any Support in the Record; for If Not, It Is the Duty of the Supreme Court to Review and Correct.

Respondents, for all of their adroitness, have presented no satisfactory answer to the foregoing. (See Petitioners' Question II). They have been unable to supply that which the record does not contain.

Respectfully submitted,

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